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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220367 **DATE:** February 20, 1986
MATTER OF: United Food Services, Inc.

DIGEST:

1. Contention that request for proposals did not allow enough time for preparation of response and unfairly favored participants in prior procurement is without merit where agency received 12 proposals, 8 from firms which did not participate in prior procurement.
2. Protest against use of negotiated procurement procedures for acquisition of food services is denied where complexity of requirements and need to assure quality of performance provided reasonable basis for use of negotiated procedures.
3. Determination to use cost-type contract, based on uncertainties attributable to lack of prior experience with contracting for food services, complexity and breadth of requirements, initiation of new recycling program, and awareness of local landfill problems which could complicate disposal and recycling efforts to an unknown degree, is reasonable.

United Food Services, Inc. (United) has filed a protest against request for proposals (RFP) No. DABT35-85-R-0147 issued by the Department of the Army for food services at Fort Dix, New Jersey.

The protest is denied.

This RFP, issued on September 21, 1985, with a closing date of October 21, 1985, was part of a cost comparison study under Office of Management and Budget (OMB) Circular A-76 to determine whether to acquire a contractor to staff, manage and operate dining facilities at Fort Dix or to retain the facilities in-house. The RFP identifies the

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tasks to be performed as the supervision, administration, operation and sanitation of the dining facilities, including performance of accounting and reporting functions, supply activities, requisitioning, receipt, handling, transportation, processing, preparation, service and disposal of food substances, and the operation of a quality-control program. The contractor will also be responsible for implementing recycling and energy conservation programs and for the continuing security of closed facilities. Offers are to be submitted on a cost-plus-award-fee basis for a base year and 4 option years.

This RFP is the second in connection with this particular evaluation, an earlier RFP having been canceled. (The earlier RFP was also the subject of a protest to our Office, Rice Services, B-218001.2, Apr. 8, 1985, 85-1 CPD ¶ 400, as was another procurement by the Army for related services. See Integrity Management International, Inc., B-216453, Dec. 13, 1984, 84-2 CPD ¶ 664.) The RFP identified the significant technical evaluation factors in order of their importance as: (1) Comprehension of specification requirements; (2) Organization and Staffing; (3) General Management; (4) Experience; (5) Phase-in; and (6) Strike or other job action contingency plan. Cost realism was also to be evaluated. The procurement was set aside for small business.

United objects to this procurement on three bases: First, United contends that the Army did not allow enough time for prospective offerors to prepare proposals and that the short time unfairly favored offerors who participated in the aborted first procurement. Second, United asserts that it is possible to provide adequate specifications to support a sealed bid type procurement. Last, United contends that the Army's use of a cost-type contract for these services is improper.

Inadequate Time to Prepare Proposals:

United contends that the 30 days the RFP allowed for offerors to prepare responses was inadequate, given the complexity of the requirements. United also asserts that this afforded competitors in the prior canceled procurement a competitive advantage since they would not have to start from scratch in preparing proposals. In support of its contentions, United cites a number of procurements for similar services at other military installations which have allowed longer periods for offerors to respond. The Army responds that 30 days was adequate time to prepare proposals

for this procurement and, as evidence, points to the fact that it received 12 responses, 8 of them from firms that did not participate in the first procurement.

We find United's arguments unpersuasive. The question here is whether all offerors were treated equally and whether the Government obtained adequate competition and reasonable prices, not whether any particular firm was given the opportunity to compete. Avitech, Inc., B-216398, Feb. 4, 1985, 85-1 CPD ¶ 133. As the Army notes, it received 12 proposals. We have previously considered the receipt of fewer proposals than this as strong evidence of adequate competition. See, e.g., The Kuljian Corp., B-203717, Aug. 28, 1981, 81-2 CPD ¶ 185. Moreover, we note that the 30 days provided by the Army comports with the requirement of the Federal Acquisition Regulation (FAR), § 5.203(b) (Federal Acquisition Circular (FAC) 84-5, Apr. 1, 1985), that agencies allow at least 30 days response time for bids or proposals from the date of issuance of a solicitation. In these circumstances, we find no basis for objection to the time allowed for response under the RFP.

This basis for protest is denied.

Use of Negotiated Procurement Procedures:

The Army justified its use of negotiated procedures on the need to evaluate proposals and conduct discussions to assure that offerors had adequate technical and financial management capabilities and fully understood the complex requirements of the RFP. The Army asserts that this is sufficient to justify the use of negotiated procurement procedures. United contends that these capabilities are always an issue in procurements and asserts that other military facilities have been able to conduct sealed-bid (formerly "advertised") procurements for these services. United asserts that the Army has demonstrated no unique requirements or complexities in this procurement that require the use of negotiated procedures and argues that this method of procurement here circumvents the regulatory preference for sealed bids.

The Competition in Contracting Act of 1984 (CICA) eliminated the statutory preference for formally advertised (now "sealed bid") procurements. 10 U.S.C.A. 2304 (West Supp. 1985). Compare United Food Services, Inc., B-217211, Sept. 24, 1985, 64 Comp. Gen. _____, 85-2 CPD ¶ 326, and cases cited therein.

The criteria which now govern the selection of procurement method are contained in 10 U.S.C.A. 2304(a)(2), which requires an agency to solicit sealed bids if:

- "(i) Time permits the solicitation, submission, and evaluation of sealed bids;
- "(ii) The award will be made on the basis of price and price-related factors;
- "(iii) It is not necessary to conduct discussions with the responding offerors about their bids; and
- "(iv) There is a reasonable expectation of receiving more than one sealed bid."

In our judgment, the Army's determination not to conduct a sealed bid was permissible under subparagraphs (ii) and (iii) of this section.

Initially, we note that this cost-comparison covers the full range of food service functions for Fort Dix, including the conduct of recycling and energy conservation programs as well as continuing responsibility for closed facilities, rather than being a relatively simple "mess attendant" contract for dining room services. Even United, in its challenge to the amount of time allowed for proposal preparation, acknowledges the complexity of the requirements. In a prior case involving a less comprehensive and complex range of services, we sanctioned a grantee's determination, under the criteria of OMB Circular A-102, which is very similar to those above, to use negotiated procurement methods. See Consolidated Food Management Co., B-217254, June 12, 1985, 85-1 CPD ¶ 673. Moreover, we referred in both Integrity Management International, Inc., B-216453, supra, and Rice Services, B-218001.2, supra, to the complexity of this procurement and the evaluation of proposals and, in the latter case, impliedly approved the use of negotiated procedures when we denied Rice's protest against its elimination from the competitive range. In our judgment, the Army's need to assure the quality of performance and the complexity of the procurement provide a

reasonable basis for the determination to conduct a negotiated procurement. Essex Electro Engineers, Inc., B-221114, Jan. 27, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ ___.

This basis for protest is denied.

Use of Cost-Type Contract:

The Army justified use of a cost-type contract on the basis that it had never before contracted for services on this scale at Fort Dix and that uncertainties in the quantities of meals to be served, the unpredictability of facility openings and/or closings, the location (field vs. dining facility) and number of meals, and the lack of data regarding the requirements of the new recycling program precluded the estimation of costs with sufficient certainty to allow the use of a fixed-price type contract. The Army also contends that the use of a fixed-price contract would not allow the Army any effective means to assure the quality of performance and points out that Army Regulation 30-1, dated September 30, 1985, recommends against the use of per-meal fixed-price contracts. The Army argues that it was within the contracting officer's discretion to consider these factors and asserts that the contracting officer's decision was reasonable.

United contends that the question is not whether the contracting officer properly exercised her discretion, but whether the determination is consistent with the regulations by showing that it was not possible to use any type of firm fixed-price contract. United asserts that services of this type have been acquired at other military installations on a fixed-price basis and contends that the Army has not demonstrated any unique requirements or uncertainties in this procurement which justify the use of a cost-type contract. United contends that the Army's determination is therefore improper.

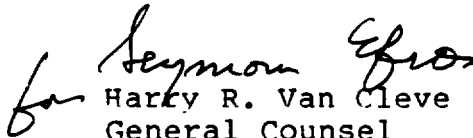
In the conduct of negotiated procurements under CICA, the head of an agency of the Department of Defense "may enter into any kind of contract that he considers will promote the best interests of the United States." 10 U.S.C.A. 2306(a). This discretion is not unfettered, however, and the selection of a cost or incentive type contract requires a determination that the selected contract type is likely to be less costly or that it is impracticable to obtain the property or services except by using such a contract. 10 U.S.C.A. 2306(c). Under the

FAR, the selection of the appropriate contract type is committed to the sound judgment of the contracting officer. FAR, § 16.103(a), (FAC 84-5).

In the exercise of this judgment, the applicable regulations require that the use of cost-type contracting be justified on the basis that the uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. FAR, § 16.301-2. A lack of experience in contracting for particular goods or services may justify the use of cost-type contracts until a contracting history adequate to provide a basis for price determination is established. FAR, § 16.103(c). Our review of such determinations is limited to ascertaining whether the decision was reasonable. Southwest Marine, Inc., B-204136, July 20, 1982, 82-2 CPD ¶ 60.

We conclude that the Army's determination to use a cost-type contract was reasonable. The contracting officer specifically cited uncertainties growing out of the absence of prior contracting for these services at Fort Dix, coupled with the complexity and breadth of the requirements, discussed above, and the introduction of a new recycling program with which the Army had no experience whatsoever, in support of the determination to use a cost-type contract. The record also reflects a concern for and awareness of external factors, such as serious landfill problems in the Fort Dix area, which could affect the contractor's recycling and disposal efforts to an unknown degree. In our judgment, these considerations reflect sufficient uncertainty to establish a reasonable basis for the contracting officer's determination to use a cost-type contract. Moreover, we do not find United's references to other procurements at other installations to be persuasive evidence to the contrary since each procurement must stand alone. Gross Metal Products, B-215461, Nov. 27, 1984, 84-2 CPD ¶ 577.

The protest is denied.


Harry R. Van Cleve
General Counsel